

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2006 MTWCC 38

WCC No. 2006-1665

MARIL BeVAN

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer.

*Appealed to Supreme Court December 15, 2006;
Affirmed December 21, 2007*

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner was a customer service and sales representative for Blackfoot Telephone Communications. She was involved in a motor vehicle accident during an authorized paid break as she returned to work. Respondent denied liability on the grounds that Petitioner was outside the course and scope of her employment.

Held: Petitioner was within the course and scope of her employment when she was involved in a motor vehicle accident during an authorized paid break.

Topics:

Employment: Course and Scope: Breaks. To determine whether the injury sustained by Petitioner during her break is compensable the Court considers four factors: 1) whether the employee was paid during the break; 2) whether the right to a break is fixed in the employment contract or pursuant to policy or regulations; 3) whether there are restrictions on where the employee may go during the break; and 4) whether the employee's activities during the break constitute a substantial deviation. *Carrillo v. Liberty Northwest Ins.*, 278 Mont. 1, 922 P.2d 1189 (1996).

Employment: Course and Scope: Breaks. Where Petitioner's employer set forth general parameters regarding breaks, such as limiting the breaks to 15 minutes, allowing employees to leave the premises, and placing the

responsibility for ensuring adequate customer service coverage on employees, the requisite restrictions necessary to satisfy the third *Carrillo* factor (whether there are restrictions on where the employee may go during break) are met.

Employment: Course and Scope: Breaks. Where evidence presented at trial showed that Petitioner's break would have been of normal duration but for her injury, the break was paid, and Petitioner's departure from the premises was with the employer's consent, Petitioner's activity did not constitute a substantial deviation, the fourth factor in *Carrillo*.

¶ 1 The trial in this matter was held on September 28, 2006, in Missoula, Montana. Petitioner Maril BeVan was present and represented by Leslae J.E. Dalpiaz. Respondent Liberty Northwest Insurance Corporation was represented by Larry W. Jones.

¶ 2 Exhibits: Exhibits 1 through 3 and 5 were admitted without objection. Exhibit 4 was withdrawn.

¶ 3 Witnesses and Depositions: The depositions of Drew Arnot and Petitioner were taken and submitted to the Court. Petitioner was sworn and testified at trial.

¶ 4 Issues Presented: The Pretrial Order states the following contested issue of law:

¶ 4a Whether Petitioner was within the course and scope of her employment at the time of her injury on May 19, 2005.¹

FINDINGS OF FACT

¶ 5 Petitioner was sworn and testified at trial, and the Court finds her testimony credible.

¶ 6 At all times pertinent to this case, Petitioner was an employee of Blackfoot Telephone Communications (Blackfoot) and worked at the Blackfoot office located in Missoula, Montana.²

¶ 7 On May 19, 2005, Petitioner was working as a customer sales and service representative. She normally worked 40 hours per week and on the day of the car accident, Petitioner was scheduled to work from 9:00 a.m. until 6:00 p.m.³

¹ Pretrial Order at 2.

² BeVan Dep. at 6; Pretrial Order at 2; Trial Test.

³ BeVan Dep. at 6-7; Trial Test.

¶ 8 Blackfoot allows its employees to take a paid 15-minute break in the morning, another paid 15-minute break in the afternoon, and an unpaid one-hour lunch break.⁴

¶ 9 Employees were free to leave the premises during break and lunch.⁵

¶ 10 There is no set or required time when an employee may take a break, other than assuring that there is adequate coverage for their customer service responsibilities.⁶

¶ 11 On the days in which Petitioner worked from 9:00 a.m. until 6:00 p.m., she regularly took her lunch from 1:00 p.m. until 2:00 p.m.⁷

¶ 12 On the days in which Petitioner worked from 9:00 a.m. until 6:00 p.m., she usually took her morning break between 11:00 a.m. and 11:15 a.m.⁸

¶ 13 On the morning of May 19, 2005, Petitioner took her morning break later than usual because of customer service responsibilities. She did not begin her break until approximately 11:45 a.m.⁹

¶ 14 On May 19, 2005, Petitioner was required to attend a work-related meeting which began at 1:30 p.m.¹⁰

¶ 15 Because the meeting was during Petitioner's regular lunch hour, she decided to take her lunch break after the 1:30 p.m. meeting.¹¹

¶ 16 At approximately 11:45 a.m. on May 19, 2005, while on her morning break, Petitioner left the Blackfoot building to drive a short distance to her apartment to let her dog outside. She intended to return to the Blackfoot building within the 15 minutes allotted for her break but was struck by a car while returning.¹²

⁴ Arnot Dep. at 8-10.

⁵ *Id.* at 12; Trial Test.

⁶ *Id.* at 9-11.

⁷ BeVan Dep. at 7 and 21.

⁸ *Id.* at 7; Trial Test.

⁹ *Id.* at 13; Trial Test.

¹⁰ Arnot Dep. at 16; Trial Test.

¹¹ BeVan Dep. at 21; Trial Test.

¹² *Id.* at 13-15 and 21; Trial Test.

¶ 17 After the accident, Petitioner called Drew Arnot, her supervisor. Mr. Arnot delivered her purse to the scene of the accident.¹³

¶ 18 On May 19, 2005, Blackfoot was insured by Respondent.¹⁴

¶ 19 Respondent denied Petitioner's claim for compensation on the grounds that she was not acting within the course and scope of her employment.¹⁵

¶ 20 The Court finds credible Petitioner's testimony that she was on her paid 15-minute break on May 19, 2005, when the car accident occurred. The uncontroverted testimony of both Petitioner and her supervisor that she did not have her purse during this short period of time corroborates this fact.

CONCLUSIONS OF LAW

¶ 21 This case is governed by the 2003 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Petitioner's accident.¹⁶

¶ 22 Petitioner bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.¹⁷

¶ 23 The burden of proving an employee deviated from the course and scope of her employment is on the employer or workers' compensation insurer.¹⁸

¶ 24 Having found that Petitioner was on a break when injured, the Court next considers the four factors set forth by the Montana Supreme Court in *Carrillo v. Liberty Northwest Ins.*, to determine whether the injury sustained by Petitioner during her break is compensable.¹⁹ These factors include: 1) whether the employee was paid during the break; 2) whether the right to break is fixed in the employment contract or pursuant to

¹³ Arnot Dep. at 13; Trial Test.

¹⁴ Pretrial Order.

¹⁵ *Id.* at 2.

¹⁶ *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 730 P.2d 380 (1986).

¹⁷ *Ricks v. Teslow Consol.*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

¹⁸ *Van Vleet v. MACO Workers' Compensation Trust*, 2004 MT 367, 324 Mont. 517, 103 P.3d 544; *Gordon v. H.C. Smith Constr. Co.*, 188 Mont. 166, 612 P.2d 668 (1980).

¹⁹ *Carrillo v. Liberty Northwest Ins.*, 278 Mont. 1, 922 P.2d 1189 (1996).

policy or regulations; 3) whether there are restrictions on where the employee may go during the break; and 4) whether the employee's activities during the break constitute a substantial deviation.

¶ 25 With respect to factors one and two, Petitioner has established that she was paid during her break and that Blackfoot provided two paid breaks to its employees as part of its personnel policy. Therefore, the first two factors are satisfied.

¶ 26 With respect to the third factor, Petitioner and her supervisor testified that Blackfoot set out general parameters on the breaks that employees could take. These general parameters included that the breaks were to be 15 minutes in duration, that employees were allowed to leave the premises, and that it was the employee's responsibility to ensure that there was adequate coverage for the customer service responsibilities. In *Carrillo*, the Montana Supreme Court held that "although [the employer] only set boundaries within which the break could be taken and set limitations on the duration of the breaks, these limitations amounted to the requisite 'restrictions on where the employee can go during the break' and therefore, [the petitioner] also satisfies this element."²⁰ Similarly, the Court concludes that the general parameters set forth by the employer in the present case satisfy the third element.

¶ 27 The final factor of the four-part test is whether Petitioner's activity during the break constituted a substantial personal deviation. In *Carrillo*, the Court determined that the employee's injury which occurred off premises while shopping on her break for a co-worker's gift for use at an employment-related party did not constitute a substantial personal deviation. Among the facts considered in making this determination were that the employee would have been on a break of normal duration if not injured and that the employer acquiesced to employees leaving the premises during breaks. Although Petitioner's break in the present case was not for an employment-related errand, as it was in *Carrillo*, the evidence presented at trial is that the break would have been of normal duration but for Petitioner's injury, that it was paid, and that Petitioner's departure from the premises during her break was with the consent of the employer. Therefore, the Court concludes that Petitioner's break does not constitute a substantial personal deviation and the fourth factor is met.

¶ 28 Since Petitioner has satisfied the *Carrillo* factors, therefore, the injury she sustained during her break is compensable.

JUDGMENT

¶ 29 Petitioner was within the course and scope of her employment at the time of her injury on May 19, 2005.

²⁰ *Id.*, 278 Mont. at 11-12, 922 P.2d at 1196.

¶ 30 This JUDGMENT is certified as final for purposes of appeal.

¶ 31 Any party to this dispute may have twenty days in which to request reconsideration from these FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT.

DATED in Helena, Montana, this 6th day of December, 2006.

(SEAL)

/s/ James Jeremiah Shea
JUDGE

c: Leslae J.E. Dalpiaz
Larry W. Jones
Submitted: September 28, 2006